

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

TRANSFERRING BOUND PRINTED MATTER
PARCELS TO THE COMPETITIVE PRODUCT LIST

Docket No. MC2021-78

REPLY COMMENTS OF THE UNITED STATES POSTAL SERVICE
(June 4, 2021)

To help clarify matters for the Commission's review and decision, the Postal Service wishes to address comments addressing the market or submarket in which Bound Printed Matter Parcels (BPM Parcels) competes, potential competitors and substitute products, and the market power test under 39 U.S.C. § 3642(b)(1), three of the four highly interrelated factors that the Commission will consider in its analysis for this transfer request. Docket No. MC2015-7, Order Conditionally Approving Transfer, July 20, 2017, at 9-11 (Order No. 4009).

1. The Relevant Market or Sub-market

The more broadly one defines the relevant market or market segment in a market power analysis, the more one is able to find competing products and competing entities, and the easier it is, therefore, to find that a product does not meet the definition of a Market Dominant product in 39 U.S.C. § 3642(b)(1), *i.e.* that it is not a product over which the Postal Service exercises sufficient market power that it can, without risk of losing a significant level of business to other firms offering similar products, set the price of the product substantially above costs, raise prices significantly, decrease the quality of the product, or decrease output. 39 C.F.R. § 3040.132(d)(1) – (4); Order No. 4009 at 30. It is unsurprising, therefore, that commenters opposing the transfer of BPM Parcels

to the competitive product list argue that the Postal Service has defined the relevant sub-market for BPM Parcels too broadly.

The Association for Postal Commerce, MPA – The Association of Magazine Media, Scholastic Inc., and the Parcel Shippers Association argue that BPM Parcels comprises its own submarket, given the weight and content restrictions on the product. Docket No. MC2021-78, Comments of the Association for Postal commerce and MPA – The Association of Magazine Media, May 17, 2021 at 2 (PostCom / MPA comments); Docket No. MC2021-78, Comments of Scholastic, Inc., Opposing the Transfer of Bound Printed Matter Parcels to the Competitive Product List, May 17, 2021 at 13-14 (Scholastic comments); Docket No. MC2021-78, Comments of Parcel Shippers Association, May 17, 2021 at 4-5 (PSA comments). But this is less an argument grounded in the law than an appeal for special treatment, as it ignores the applicable standard for identifying the relevant market or market segment. These commenters have defined the relevant market sector too narrowly.

For purposes of antitrust analysis, products do not need to be identical to exist in the same market or market segment, and it is not dispositive if there are differences between or among products, such as the content restriction on BPM Parcels that does not exist for UPS Ground or Fedex Ground. *United States v. E.I. DuPont de Nemours & Co.*, 351 U.S. 377, 394 (1956) (“[An] illegal monopoly does not exist merely because the product said to be monopolized differs from others. If it were ... so, only physically identical products would be a part of the market.”)

Rather, whether a product should be included in the relevant market or market segment is a function of whether the products are reasonably interchangeable. *DuPont*,

351 U.S. at 393 (“Determination of the competitive market for commodities depends on ... how far buyers will go to substitute one commodity for another”); Docket No. MC2013-57, Order Denying Request, Dec. 23, 2014, at 18 (Order No. 2306) (“Market definition focuses on demand substitution”). As the Postal Service has already shown, BPM Parcels is reasonably interchangeable with UPS Ground and FedEx Ground.

Scholastic takes the argument one step further, arguing that the “educational, multi-component bundles” it sends to schools using BPM Parcels comprise their own submarket, given their distinctive characteristics. Scholastic comments at 27-28. Those characteristics are not as distinctive as Scholastic suggests. Scholastic admits that it shrink-wraps, rather than boxes, the materials it sends to schools simply as a matter of cost, Scholastic comments at 3, 25, and there is nothing unique about book club, catalog, and advertising materials generally, though Scholastic’s trademarks are unique to the materials they send. Please see Docket No. 2021-78, Responses of the United States Postal Service to Questions 1 – 9a and 10 - 12 of Chairman’s Information Request No. 1, April 21, 2021, at response 10a for the Postal Service’s previous discussion of this point.

This too is an appeal for special treatment – a market segment comprising a single shipping use for one entity. Under antitrust principles, the relevant market is defined by the producers, not the consumers, of the product in question. *Brown Shoe v. United States*, 370 U.S. 294, 325, (1962); *Newcal Industries, Inc. v. Ikon Office Solution*, 513 F.3d 1038, 1045 (9th Cir. 2008). That is, the relevant market here is not defined by what Scholastic sends but by the products the Postal Service and its competitors offer

to transport them, and Scholastic can send its materials to schools and classrooms using any competing product simply by boxing them.

Further, the comments submitted by teachers, administrators, and early-childhood providers do not show that BPM Parcels is its own market segment. PostCom / MPA comments at 2. These comments are an orchestrated collection of lightly edited form letters. One commenter, in fact, submitted the letter unaltered and with blanks unfilled, see Docket No. MC2021-78, comment of C. Diemer. Fewer than 20 commenters (of 366) made any significant modifications the form letter to express their personal views. See Docket No. MC2021-78, Comments of B. Shannon, C. Wiseman, J. Rokes, K. Summers, N. Chudnovsky, S. Campbell, V. Brandt, T. Gothmann, S. Skinner, M. Rodgers, M. Grossholz, V. Megley, J. Shallow, M. Medina, A. Shirley, C. Ramsey, K. Rensch.

What is more, while the form-letter comments are rightly and appropriately concerned about access to books for poorer children -- a serious, complex, if not intractable problem that can have grave consequences for education -- the issue should not be used here as a means to obscure Scholastic's profit motive. Scholastic is the self-described "largest publisher and distributor of children's books in the world,"¹ and it has a market capitalization (SCHL) of \$1.15 billion.² It can pay higher prices for shipping, but because it is a publicly listed profit-making entity with a fiduciary obligation to maximize value for its shareholders, it understandably chooses not to. Instead, it characterizes the possibility of higher payments as "jeopardizing its educational mission" rather than its bottom line. Scholastic comments at 3, 25. One commenter

¹ <https://www.scholastic.com/aboutscholastic/our-businesses/> Accessed May 28, 2021

² <https://www.morningstar.com/stocks/xnas/schl/quote> Accessed May 28, 2021.

succinctly captured what this exercise is really about for Scholastic: “[K]eep shipping cost down for Scholastic please,” reads the entire comment of M. Rogers.

In short, the argument that the comments submitted by teachers, administrators, and early childhood providers demonstrate that BPM Parcels is a recognized submarket is yet another appeal for special treatment. Properly applying the standards of Section 3642, which is the Commission’s task in this proceeding, shows that BPM Parcels is not a market-dominant product.

2. Competitors and Competing Products

Just as commenters opposing the transfer of BPM Parcels to the competitive product list argue that the Postal Service has defined the relevant sub-market for BPM Parcels too broadly, they also argue that the Postal Service has identified too many competitors and competing products for BPM Parcels. This is, likewise, unsurprising. If there are fewer competitors in the market and fewer options from which consumers may choose, it is easier to find that BPM Parcels is not a competitive product.

PSA, Scholastic, and PostCom / MPA argue that “hybrid” products, such as UPS Mail Innovations and FedEx SmartPost, don’t compete with BPM Parcels. Because these products use BPM Parcels to access the Postal Service’s last-mile delivery network, the argument goes, they can’t compete with BPM Parcels because a product cannot compete with itself. Similarly, while the “resellers” of the hybrid products compete with one another, they aren’t in competition with the Postal Service. PSA comment at 4; attached Declaration of Gaston Curk on Behalf of OSM Worldwide at ¶ 5; Scholastic comments at 18-19; PostCom / MPA comments at 5. This argument overlooks a number of things.

First, it overlooks the common experience of the customer, which can choose to use the Postal Service and send its bound, printed materials as BPM Parcels, or it can contract with UPS for UPS Mail Innovations, or with FedEx for SmartPost, or DHL for SmartMail. Those private entities would, of course, be happy to make the customer competitive offers to win its business. From the point of view of the customer, then, these entities are in competition, whether or not the customer knows that these services use the Postal Service for last-mile delivery.

Second, and more importantly, the argument overlooks what explains the customer's experience. As the Public Representative correctly points out, economists split the delivery world into two components, upstream (processing) and downstream (delivery). Docket No. MC2021-78, Public Representative Comments, May 17, 2021, at 4. The "resellers" such as OSM compete with the Postal Service in processing packages for delivery. UPS and FedEx have their own end-to-end delivery networks with last-mile capability, and they compete with the Postal Service in both processing and delivering packages. The "hybrid" products are all, therefore, properly part of the market segment in which BPM Parcels competes, and the resellers are all properly competitors of the Postal Service.

Third, a necessary implication of the commenters' argument here is the more general assertion that no hybrid product can compete with the postal product that it uses for last-mile delivery. If that were the case, then Parcel Select, which has always been a competitive product, would have to be Market Dominant because the majority of packages sent using Parcel Select are dropshipped for last-mile delivery. Parcel Select is listed as a competitive product in the Postal Accountability and Enhancement Act. 39

U.S.C. § 3631(a)(3) (listing “bulk parcel post” as a competitive product); Docket No. RM2007-1, Order Proposing Regulations to Establish a System of Ratemaking, Aug. 15, 2007, at ¶ 3012 (“‘bulk parcel post’ consists of the following mail matter: Parcel Select, Parcel Return Service, and Parcel Post mail qualifying for OBMC, BMC, and barcode discounts”) (Order no. 26).

PSA and Scholastic also argue, at length, that UPS Ground and FedEx Ground do not compete with BPM Parcels. Because those products are priced much higher than BPM Parcels, they contend, the Ground products are not reasonably interchangeable with BPM Parcels. Scholastic comments at 16 – 20, PSA comments at 12 – 15.

The commenters correctly note that the question of whether products compete in the same market is determined by whether they are reasonably interchangeable or whether there is cross-elasticity of demand. *DuPont*, 351 U.S. at 394-395. However, price differences between products does not mean that they are not interchangeable, even if one product is multiple times the price of another. The Supreme Court, in *DuPont*, found DuPont’s cellophane to be reasonably interchangeable with, and to compete with, other similar wrapping products, even though it cost two or three times as much. 351 U.S. at 401.

Despite the commenters’ protestations, the same is true here, especially as the effect of the Market Dominant price cap has been to hold down BPM Parcels prices, a point the Postal Service has previously made. Docket No. 2021-78, Responses of the United States Postal Service to Questions 1 – 3a and 4b of Chairman’s Information Request No. 2, April 22, 2021, at response 3a. BPM Parcels is reasonably

interchangeable with the UPS and FedEx Ground products and, as the Postal Service also has already noted, the products are, in fact, interchanged. Scholastic uses both BPM Parcels and UPS Ground to fulfill book orders. Scholastic comments at 2 (“Scholastic also uses BPM Parcels to fulfill its book orders”); Scholastic Book Clubs Customer Service FAQs.³

Indeed, Scholastic’s website strongly suggests that it uses UPS, rather than the Postal Service, as its primary means of fulfilling book orders shipped to parents and children at home. In an FAQ for its book club parents about tracking information, Scholastic writes:

[Q:] Will families receive tracking information for ship-to-home orders?

[A:] Yes, families will get a shipping-confirmation email that will include a link to track the order. Families will also receive the following emails regarding their order status:

- Delivery confirmation
- Arriving tomorrow
- Order delays (if UPS revises the estimated delivery date)
- Unsuccessful delivery attempt⁴

The answer mentions only UPS.

What is more, this emphasizes the nature of what Scholastic calls its “educational multi-component bundles.” Scholastic comments, *passim*. If books are sent separately, what Scholastic sends to schools using BPM Parcels is, ultimately, advertising – magazines and book club “kits,” Scholastic comments at 2, from which parents can buy books for their children and teachers can earn credits for books in the classroom.

³ <https://scholastic.force.com/parentfaqs/s/article/Will-families-receive-tracking-information-for-ship-to-home-orders> Accessed May 28, 2021.

⁴ *Id.*

The assertion in the form letter comments, then, that if the Postal Service raises prices on BPM Parcels, it will be responsible for higher book prices that some families cannot afford is deeply suspect. What increasing prices for BPM Parcels would do is raise prices for Scholastic's advertising "targeting educators, students and their parents." Scholastic comments at 25. Whether Scholastic passes those costs along to book buyers is a matter entirely under its control.

3. The Market Power Test

PostCom / MPA, Scholastic, and PSA all argue that under the market power test, BPM Parcels is not a competitive product. PostCom / MPA comments at 4-5; Scholastic comments at 6 – 13; PSA comments at 5 – 12. As set out in the statute, a product is Market Dominant if the Postal Service can "effectively set the price of such product substantially above costs, raise prices significantly, decrease quality, or decrease output, without risk of losing a significant level of business to other firms offering similar products." 39 U.S.C. § 3642(b)(1). Some of these commenters, however, restate the test in various ways that are incorrect or unclear, and all commenters misapply it to the evidence here.

To begin with, Scholastic argues that the market power test in 39 U.S.C. § 3642(b)(1) codifies the "SSNIP" test, whether a firm can increase profits through a small but significant non-transitory increase in price. "If such a price increase would increase the firm's profits," Scholastic argues, "the firm has market power." Scholastic comments at 7. This, however, misunderstands the SSNIP test.

As the Public Representative correctly points out, the SSNIP test is used under the Horizontal Merger Guidelines from the Department of Justice and Federal Trade

Commission to define a product's market, not to test whether a firm has market power.

Public Representative comments at 12. The discussion of the SSNIP test appears in the

Horizontal Merger Guidelines in section 4.1, Product Market Definition, and section

4.1.1, The Hypothetical Monopolist Test, and states this explicitly:

When a product sold by one merging firm (Product A) competes against one or more products sold by the other merging firm, the Agencies define a relevant product market around Product A to evaluate the importance of that competition. Such a relevant product market consists of a group of substitute products including Product A....

The Agencies employ the hypothetical monopolist test to evaluate whether groups of products in candidate markets are sufficiently broad to constitute relevant antitrust markets....

The hypothetical monopolist test requires that a product market contain enough substitute products so that it could be subject to post-merger exercise of market power significantly exceeding that existing absent the merger. Specifically, the test requires that a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future seller of those products ("hypothetical monopolist") likely would impose at least a small but significant and non-transitory increase in price ("SSNIP") on at least one product in the market, including at least one product sold by one of the merging firms.

DOJ and FTC Horizontal Merger Guidelines, Aug. 19, 2010, at 8 – 9. Please also see

Docket No. 2021-78, Responses of the United States Postal Service to Questions 1 –

3a and 4b of Chairman's Information Request No. 2, April 22, 2021, at response 3a for the Postal Service's previous discussion of SSNIP.

Next, Scholastic's comments create some ambiguity by pointing out a distinction between "market power" and "monopoly power" and stating that the Postal Service has admitted that it has market power. Scholastic comments at 6. This incorrectly characterizes the Postal Service's position.

In antitrust law, "market power" and "monopoly power" are different terms, yet the distinction between their meanings is far from clear. Some scholars believe that there is,

or ought to be, no distinction between the terms at all. See, e.g., Krattenmaker, Lande, and Salop, Monopoly Power and Market Power in Antitrust Law, 76 Geo. L.J. 241, 247 (December 1987). Further, courts have conflated or confused the terms. *Id.* at 245; Price, Market Power and Monopoly Power in Antitrust Analysis, 75 Cornell L. Rev. 190, 198-199 (Nov. 1989).

There is a useful distinction, however. As the Postal Service has already pointed out in its answers to an information request, the Supreme Court understands “market power” to be a matter involving a firm’s ability to raise prices, *NCAA v. Bd. Of Regents of the Univ. of Oklahoma*, 468 U.S. 85, 109 n. 38 (1984), and monopoly power as “the power to control prices or exclude competition.” *U.S. v. E. I. du Pont de Nemours & Co.*, 351 U.S.377, 391 (1952). Please see Docket No. MC2021-78, Responses of The United States Postal Service to Questions 1 – 6 AND 8 – 9 to Chairman’s Information Request No. 3, April 23, 2021, at response 4. Monopoly power is, in other words, a high degree of market power, Landes & Posner, Market Power in Antitrust Cases, 94 Harv. L. Rev. 937, 937 (1981), and when courts refer to market power, they refer to some nontrivial amount of control over price less than the power a monopolist possesses. Price, 75 Cornell L. Rev. at 205.

This is the distinction the Postal Service has been making, this is the meaning underlying its use of the terms “monopoly power” and “market power,” and, indeed, the fact that there are differing degrees of market power is embodied in 39 U.S.C.

§ 3642(b)(1):

The market-dominant category of products shall consist of each product in the sale of which the Postal Service exercises *sufficient market power* that it can effectively set the price of such product substantially above costs, raise prices significantly, decrease quality, or decrease output, without risk of losing a

significant level of business to other firms offering similar products. (Emphasis added.)

That is, the question is not whether the Postal Service exercises *any* market power in the BPM Parcels market, but rather whether it exercises *sufficient* market power such that BPM Parcels must remain a Market Dominant product. (Emphasis added.)

Thus, the assertion that the Postal Service has “admitted” it has market power is misleading. The Postal Service admits that it has *some* market power in the BPM Parcels market, if only because it participates in the BPM Parcels market. UPS, FedEx, OSM, DHL, and the other competitors in the BPM Parcels market have market power in this sense as well.

The Postal Service, however, denies that it has *sufficient* market power to meet the definition of a Market Dominant product in 39 U.S.C. § 3462(b)(1) and contends, to the contrary, that it has shown BPM Parcels to be a competitive product.

All of that said, PostCom / MPA, Scholastic, and PSA all also argue that BPM Parcels meets this definition (and understanding) of market power. PSA contends the history of Parcel Select Lightweight prices after the transfer of that product to the competitive list shows that that the Postal Service will not lose significant business if it raises prices on BPM Parcels. PSA comments at 5 – 12. It’s “Parcel Select Lightweight all over again.” PSA comments at 5. Scholastic draws the same conclusion. Scholastic comments at 8 – 13. PostCom / MPA argues that “the Postal Service’s track record telegraphs its intention here. PostCom / MPA comments at 3.

To begin with, these arguments are not persuasive because they ignore the basic fact that neither Parcel Select Lightweight nor any other product previously transferred participates in the same market as BPM Parcels, and so the history of

Parcel Select Lightweight prices is not germane to the market power analysis here. Of course there are similarities between BPM Parcels and Parcel Select Lightweight, Scholastic comment at 9, but there are similarities among all package products, and no party or commenter contends that Parcel Select Lightweight competes in the same market as BPM Parcels. The argument, therefore, boils down to a simple request that because the Postal Service has raised prices when it transferred other parcel products in the past, it should not be allowed to do so here. To state the argument thus is to refute it.

Further, the arguments ignore the effect of the price cap on current BPM Parcels prices. Post-transfer increases in prices, such as occurred with Parcel Select Lightweight, are not, in and of themselves, indicative of market power because the effect of removing the cap is to allow prices to rise.

Further still, if the commenters are to be understood as suggesting that the Commission decided the Parcel Select Lightweight transfer case incorrectly, the Postal Service does not believe it is appropriate to bring a collateral attack on a decade-old decision by submitting public comments to an unrelated transfer request.

Finally, only the PostCom / MPA and Scholastic comments reach the true issue here, and that is whether the record before the Commission shows that the Postal Service exercises sufficient market power such that it can raise prices on BPM Parcels so significantly that it does not risk losing a significant level of business to other firms offering similar products.

PostCom / MPA argues that the Postal Service has not met its burden of proof. PostCom / MPA comments at 4 – 5. But this is not so. The Postal Service has provided

its analysis of the effects of a range of price increases for BPM Parcels. Docket No. MC2021-78, Responses of the United States Postal Service to Questions 3b and 4a Of Chairman's Information Request No. 2, Apr. 23, 2021, at Attachment A. This is an internal, non-public analysis created to inform decision-making officials, and it shows that for prices hikes between 3 and 50 percent, any hike in prices will cause a loss of volume of approximately 1 percent for each percentage point prices are raised. That, on its face, is a significant loss in volume, especially as the Postal Service's portion of the BPM Parcels market is already quite small, less than 4 percent. Docket No. MC2021-78, Responses of the United States Postal Service to Questions 1 – 6 and 8 – 9 to Chairman's Information Request No. 3, Apr. 23, 2021, at response 1.

Scholastic recognizes this but attempts to explain it away. Scholastic contends that the loss of volume is not significant because there is no evidence showing that the Postal Service would lose this volume to other firms offering similar products, as 39 C.F.R. § 3642(b)(1) requires. This, however, requires the Commission to accept Scholastic's argument that there are not competitors or competing products for BPM Parcels, but there are, as the Postal Service has already shown, and that is where the lost volume will go.

For all of the foregoing reasons, and for the reasons the Postal Service has already expressed in support of its request, the Commission should transfer BPM Parcels to the competitive products list.

Respectfully submitted,

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